BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN R. MONTGOMERY	)	
Claimant	)	
VS.	)	
	)	Docket No. 253,317
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE CO. STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 21, 2003 Award of Administrative Law Judge Jon L. Frobish. Claimant was granted benefits after the Administrative Law Judge determined that he was permanently totally disabled, finding claimant was realistically unemployable and incapable of substantial and gainful employment. The Appeals Board (Board) heard oral argument on November 21, 2003.

APPEARANCES

Claimant appeared by his attorney, Stephen J. Jones of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury? Claimant contends that he is realistically unemployable under *Wardlow*[1] and, therefore, is entitled to an award of

[1] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

permanent total disability for the injuries suffered on January 31, 2000. Respondent disagrees and contends claimant is limited to a permanent partial disability, as he did not put forth a good faith effort to obtain employment and, therefore, a wage should be imputed. Additionally, respondent argues that claimant was terminated for cause, having failed to timely provide an off-work slip from his doctor, which would have allowed claimant to remain on medical leave, thereby avoiding termination. Respondent argues that had claimant provided that off-work slip, he would have remained employed with respondent at a comparable wage and would be limited to his functional impairment only. Respondent further argues that even without the termination, claimant has failed to put forth a good faith effort to find employment after leaving respondent and a wage should be imputed under K.S.A. 1999 Supp. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds as follows:

Claimant suffered accidental injury on January 31, 2000, when, while installing fire shield blankets, he reached up, pulling with his right arm, into an access hole. Claimant felt right shoulder pain, back pain and numbness in his right arm. Initially, he thought he had just pulled something, but claimant's condition continued to worsen. By the following Monday workday, claimant's condition had deteriorated to the point where he requested medical treatment. He was sent to Central Medical, where they diagnosed a possible torn rotator cuff, provided him with restrictions and scheduled physical therapy at St. Francis Hospital. At St. Francis, it was determined that claimant also suffered a neck injury, and he was referred for an MRI, which displayed two herniated discs. Claimant was sent to Paul S. Stein, M.D., a neurologist, who provided conservative treatment for two to three months. Claimant was then referred to Dr. John Hered for a second opinion. Both Dr. Hered and Dr. Stein ultimately determined that claimant's only treatment option was surgery. Claimant was then referred to Eustaquio Abay, M.D., who performed a spinal fusion at C5-6.

Claimant initially progressed well after the surgery, but later the numbness started to return and so did some of the pain. Claimant underwent another MRI, and a bone growth was discovered in his neck. Claimant was also diagnosed with right arm adhesions, for which he was provided therapy. Claimant returned to work light duty.

On May 21, 2001, while on light duty, claimant passed out at work. Claimant was initially diagnosed with panic attacks and chest pain. As claimant had a history of heart problems, he was hospitalized while he underwent heart tests. The tests determined that claimant was not having a heart attack, and it was ultimately determined that claimant's problems were associated with stress and pain.

As respondent had a policy which prohibited people from working while on pain medication, claimant was not taking his pain medications while working. Apparently, this resulted in the stress and chest pains, which resulted in claimant passing out at work. He was taken off work by internal medicine specialist Robert J. Fowler, M.D., who had earlier examined claimant for chest pains in March of 1998. Dr. Fowler took claimant off work as a result of the problems associated with the May 21, 2001 incident. Claimant remained off work on medical leave of absence through June, July, August, September and October of 2001.

Under respondent's policy, claimant was obligated to provide medical justification for his continued off-work status prior to the expiration of his then current off-work status. Claimant did provide medical support for his continued off-work status in June, July, August and September of 2001. Claimant, however, failed to provide any information in October of 2001 regarding his ongoing off-work status. Claimant's wife, Lora Montgomery, who testified on two occasions in this matter, stated that she attempted to contact Dr. Fowler's office, but was advised that Dr. Fowler was unavailable at the end of October 2001. However, Dr. Fowler testified that there was no indication from his records that he was unavailable during October of 2001.

On November 2, 2001, respondent prepared a letter, which was mailed to claimant on November 6, 2001, advising that claimant was late in providing the off-work medical justification and that failure to do so could result in termination. Claimant's wife testified that she then obtained an off-work slip from Dr. Fowler, faxing it to respondent on November 8, 2001. However, respondent has no record of that information being received by them on November 8. Claimant's was unable to provide any type of fax receipt indicating that the document on November 8 had actually been sent. Respondent then provided claimant a letter of termination dated November 15, 2001, which claimant received on November 16, 2001. Claimant's wife then again obtained the November 8 off-work slip, faxing it to respondent on November 19, 2001. This time a fax receipt was available and was presented into evidence. However, claimant does note that when the initial fax was sent on November 19, claimant called respondent's human resources representative Jean Roller and was advised that respondent did not have the fax in its possession. Claimant's wife then re-faxed the medical release on that same date. Claimant was terminated effective November 15, 2001, for failure to extend the leave of absence.

Claimant was referred to medical doctor Jon C. Parks, M.D., who specializes in pain management. Dr. Parks first saw claimant in April of 2002 for treatment of the neck and right arm pain. He found claimant to be having significant muscle spasms in the neck and right shoulder for which treatment was provided in the form of muscle relaxants and pain medication. Claimant was also placed on anti-seizure medication in May of 2002. Dr. Parks found claimant to be restricted from working around machinery, although he did

testify that he does not give impairment ratings or disability determinations during his treatment process.

Claimant was referred for an evaluation to Pedro A. Murati, M.D., board certified specialist in physical rehabilitation. Dr. Murati placed restrictions on claimant, finding claimant to be unemployable due not only to the chronic pain, but also due to the numerous narcotics claimant was taking for his injuries. Claimant was found to be permanently totally disabled by the Administrative Law Judge, based upon the opinion of Dr. Murati.

Even though Dr. Murati testified that claimant was realistically unemployable, when provided the task list of Jerry D. Hardin, Dr. Murati found claimant to have suffered a 63 percent loss of task performing ability as a result of the injuries suffered with respondent.

Claimant was referred for an evaluation by the Administrative Law Judge to C. Reiff Brown, M.D., board certified in orthopedic surgery. Dr. Brown examined claimant on August 14, 2002, at which time he found claimant to be limited in his ability to function, finding claimant had a 24 percent whole body functional impairment pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). This included both the right shoulder and cervical injuries that claimant had suffered. He felt claimant should permanently avoid work that involved significant use of the right upper extremity, limited claimant to no lifting over 20 pounds occasionally and 10 pounds frequently, and felt claimant should avoid flexion of his neck greater than 20 degrees. Dr. Brown testified that if claimant did find work within his restrictions, he had no problem with claimant performing that work. He did recommend, however, considering the narcotic medications claimant was taking, that claimant avoid working around heavy equipment or machinery.

Claimant was referred to vocational experts Jerry D. Hardin and Dan Zumwalt for evaluations in this matter. Mr. Hardin opined that claimant was capable of earning $320 a week, which, when compared to claimant's average weekly wage of $1,104.85, resulted in a wage loss of 71 percent. Mr. Zumwalt opined that claimant was capable of earning $8.71 an hour, full time, which resulted in a wage loss of 68 percent.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and

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[2] K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[3]

In *Foulk,*[4] the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the current statute) by refusing an accommodated job that paid a comparable wage.

Claimant argues that he is permanently totally disabled as a result of the injuries of January 31, 2000. Respondent, on the other hand, argues that it had accommodated claimant and was capable of continuing to make accommodation before claimant's failure to provide justification for his continued medical leave of absence.

It is noted that claimant's wife provided verification of claimant's off-work status for several months prior to the October 29, 2001 expiration of claimant's leave of absence. Respondent's wife testified that she provided an off-work slip to respondent on November 8, 2001, but was unable to provide a fax receipt. However, there were no fax receipts provided for the prior slips, which were sent apparently from claimant's home. The only fax receipt placed in the record was that of November 19, 2001, which respondent's wife sent from her office.

The Board acknowledges that respondent had accommodated claimant in the past and had, in fact, placed claimant on medical leave for over two years for a prior injury. Respondent did display a willingness to accommodate claimant's injuries, even over long periods of time. However, the Board does not find that the activities of both claimant and his wife, which led up to claimant's termination of employment in November 2001, constituted bad faith on claimant's part. The Board does not find claimant's actions in this instance to constitute a refusal of an accommodated job. The confusion associated with claimant's termination did not result from any bad faith on claimant's part or on the part of claimant's wife. It was merely a miscommunication between claimant and respondent, which unfortunately led to claimant's loss of employment. The Board, therefore, does not find claimant's actions leading to the termination of employment constitute a lack of good faith on claimant's part.

However, K.S.A. 1999 Supp. 44-510e, which grants work disability based on the lost ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with

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[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury, requires that a good faith effort to obtain employment continue after a termination. In *Copeland,*[5] the Kansas Court of Appeals held that if a worker does not put forth a good faith effort to find appropriate employment after recovering from the work-related accident, then the fact finder will have to determine an appropriate post-injury wage based upon all the evidence before it, including expert testimony concerning the capacity to earn wages.[6]

In this instance, claimant continued treatment with Dr. Fowler only until claimant succeeded in obtaining Social Security benefits. After that, claimant ceased going to Dr. Fowler. Claimant also failed to put forth any effort to obtain post-injury employment after the termination in November of 2001. The Board finds claimant's activities in that regard do not constitute a good faith effort under K.S.A. 1999 Supp. 44-510e and, therefore, a wage should be imputed.

The Board notes the Administrative Law Judge determined that claimant was realistically unemployable and incapable of substantial and gainful employment based upon the opinion of Dr. Murati. However, no other medical doctor (who testified in this matter) or vocational expert (who testified in this matter) found claimant to be permanently totally disabled. The Board does not find Dr. Murati's opinion on that issue to be sufficiently persuasive to outweigh the opinions of all the other experts in this record. The Board, therefore, finds that claimant is not permanently and totally disabled as a result of the injuries of January 31, 2000, and, therefore, claimant's lack of a good faith effort to find employment mandates that a wage be imputed pursuant to K.S.A. 1999 Supp. 44-510e.

Both Mr. Hardin and Mr. Zumwalt provided opinions regarding claimant's ability to earn wages after his injury. Mr. Hardin found claimant had lost 71 percent of his wage-earning ability based upon an imputed wage of $320 per week. Mr. Zumwalt found claimant to have suffered a 68 percent wage loss based upon an imputed wage of $8.71 per hour. The Board in considering both opinions, finds that claimant has suffered a 70 percent wage loss, which, when compared to claimant's task loss of 63 percent, results in a permanent partial general disability of 66.5 percent to the body as a whole for the injuries suffered on January 31, 2000. The Board, therefore, modifies the Award of the Administrative Law Judge to award claimant a 66.5 percent permanent partial general disability to the body as a whole, finding that claimant has not proven that he is permanently and totally disabled as a result of those injuries.

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[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Id*. at 320.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated May 21, 2003, should be, and is hereby, modified to grant claimant a permanent partial general disability of 66.5 percent to the body as a whole for the injuries suffered on January 31, 2000.

Claimant is awarded 43 weeks of temporary total disability compensation at the rate of $383 per week totaling $16,469, followed by 218.1 weeks of permanent partial disability compensation at the rate of $383 per week totaling $83,531, for a total award not to exceed $100,000.[7]

As of March 22, 2004, there would be due and owing to claimant 43 weeks of temporary total disability compensation at the rate of $383 per week totaling $16,469, followed by 173 weeks of permanent partial compensation at the rate of $383 per week totaling $66,259, for a total due and owing of $82,728, which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, the remaining balance in the amount of $17,272 shall be paid at the rate of $383 per week until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of March 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[7] K.S.A. 44-510f (Furse 1993).

c: Stephen J. Jones, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director